United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 16, 2022
Lyle W. Cayce
Clerk

No. 22-70012

STEPHEN DALE BARBEE,

Plaintiff—Appellee,

versus

BRYAN COLLIER; BOBBY LUMPKIN; DENNIS CROWLEY,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-3077

Before DENNIS, ELROD, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Defendant directors of the Texas Department of Criminal Justice (TDCJ) filed an interlocutory appeal of the district court's grant of a preliminary injunction. We VACATE the district court's preliminary injunction. The district court is not authorized to order the Defendants to adopt a written policy to govern executions in general, and the district court's

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

two previous injunctions herein to that effect were abuses of its otherwise sound discretion. *See Barbee v. Collier*, No. 22-7011, 2022 WL 16860944 (5th Cir. Nov. 11, 2022). The mandate shall issue forthwith.

IT IS SO ORDERED.

JAMES L. DENNIS, *Circuit Judge*, concurring:

I concur fully in the majority opinion. I write separately only to describe the sort of narrowly drawn injunctive relief I believe would be appropriate. The district court might have been concerned TDCJ would go back on its word to accommodate Barbee's spiritual advisor requests, although that seems unwarranted. Nevertheless, even if the district court were to find it necessary, it should only "order[] the accommodation." *Ramirez v. Collier*, 142 S. Ct. 1264, 1283 (2022). Thus, a proper injunction would require Defendants to permit Barbee's spiritual advisor to hold Barbee's hand and to pray at a moderate volume loud enough for Barbee to hear during the execution.[1] *See id.* at 1284 (emphasis added) (stating the "appropriate preliminary relief" is for the district court to order Texas "to permit *audible prayer* [and] *religious touch*"); *see also Gonzales v. Collier*, No. 21-CV-828 (S.D. Tex. July 5, 2022), ECF No. 92 (granting such a preliminary injunction).

[1] Bobby Lumpkin's affidavit and Barbee's proposed preliminary injunction, which Barbee attached to his supplemental briefing in the district court on the issue of whether a preliminary injunction was appropriate, both contain these handholding and moderate volume provisions, among other details the district court may wish to consider.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring:

I concur in the majority opinion. I also concur with Judge Dennis's assessment that, if relief were necessary here, the proper remedy would be an injunction directing the State of Texas to allow Stephen Barbee the religious accommodations he requests. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1283 (2022) (If "a court determines that relief is appropriate under RLUIPA, the proper remedy is an injunction ordering the accommodation . . . ."); *ante* at 3. I write separately to explain the findings that would be necessary to justify such an injunction.

Barbee requests that his spiritual advisor be allowed to be present during the execution, to touch his hand, and to pray audibly. When Barbee first made those requests in 2021, the State denied them. But after the Supreme Court handed down *Ramirez*, in which the Court instructed the State to allow similar religious accommodations, the State reversed course, and informed Barbee that he will be allowed the accommodations he seeks. What is more, the Director of the Texas Department of Criminal Justice's Correctional Institutions Divisions executed an affidavit swearing to provide Barbee the exact relief he requests. The Director also swore that the "approved accommodations will not be withdrawn."

Despite these assurances, the district court suggests the State might not follow through on its word. *See Barbee v. Collier*, Memorandum and Order, No. 4:22-cv-3077, at 11–14 (S.D. Tex. Nov. 3, 2022). However, it is well established that we must presume that state officials act in good faith. *See, e.g.*, *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *affirmed sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). To be sure, this presumption can be rebutted. But to do so, the party opposing the State must sponsor specific evidence that demonstrates the State will not act in accordance with the law.

Here, the record demonstrates that the State fully intends to give Barbee the religious accommodations he seeks. Indeed, it swore under penalty of perjury that it will do so. It could theoretically be the case that the State's promise is not credible. But to issue an injunction ordering the State to provide the religious accommodations would require a specific conclusion that Barbee had rebutted the presumption of good faith. That conclusion, in turn, would require specific findings of fact that the State—over the weight of evidence to the contrary—is acting in bad faith.

With that additional explanation, I concur.

United States Court of Appeals

FIFTH CIRCUIT
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November 16, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-70012 Barbee v. Collier
USDC No. 4:21-CV-03077

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

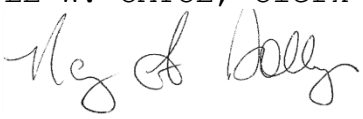
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Allen Richard Ellis
Mr. Stephen M. Hoffman
Mr. Tivon Schardl